

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHAN RIENSCHKE, individually and on
behalf of all the members of the class of
persons similarly situated,

Plaintiffs,

v.

CINGULAR WIRELESS LLC, a Delaware
limited liability company, d/b/a Cingular
Wireless, NEW CINGULAR WIRELESS
SERVICES, INC., a Delaware corporation,
d/b/a AT&T Wireless, NEW CINGULAR
WIRELESS SERVICES PURCHASING
COMPANY, L.P., a Delaware limited
partnership, d/b/a Cingular Wireless, and
NEW CINGULAR WIRELESS PCS, LLC, a
Delaware limited liability company, d/b/a
Cingular Wireless,

Defendants.

No. C06-1325Z

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss for Failure to State a Claim, docket no. 24. Defendant Cingular Wireless LLC ("Cingular") asks that all Plaintiff's claims be dismissed. Having considered Defendant's motion, response, and supplement, and Plaintiff's response, supplement, surreply, and declaration, the Court now enters the following Order:

BACKGROUND

Plaintiff Nathan Riensche is an individual who is a cell phone subscriber of Cingular Wireless, LLC (“Cingular”). Mr. Riensche challenges Cingular’s collection of a \$0.51 surcharge imposed on Washington customers to recoup the Washington Business and Occupation tax. Mr. Riensche’s complaint alleges Cingular’s collection of the B&O tax violates R.C.W. 82.04.500 by itemizing a \$0.51 surcharge on his bill (the “B&O surcharge”). Mr. Riensche also alleges that the collection of the surcharge was a violation of Washington’s Consumer Protection Act, R.C.W. 19.86.010 (“CPA”), was a breach of contract, and resulted in unjust enrichment of Cingular. Mr. Riensche seeks class action status, monetary damages, and an injunction prohibiting Cingular from further billing and collecting the surcharge.

Cingular has moved to dismiss all of Mr. Riensche’s claims for failure to state a claim. Cingular argues that Mr. Riensche’s claims are prohibited by the Federal Communications Act (“FCA”) which forbids states from regulating wireless telephone rates and preempts state law to the contrary. 47 U.S.C. §332(c)(3)(A).

Similar Actions

Plaintiff’s counsel has filed suit on this issue with other plaintiffs and other carriers. Previously, this Court ruled that the FCA preempted R.C.W. 82.04.500 as it applied to Cingular’s collection of the B&O surcharge. Peck v. Cingular Wireless, No. C06-0343-TSZ, Order, docket no. 61. This Court also ruled that Mr. Peck’s breach of contract claim was preempted because such a claim was inconsistent with the FCA. Id. at 6. Mr. Peck has appealed this Order. Peck, Notice of Appeal, docket no. 70.

Plaintiff’s counsel also represents two other plaintiffs who are suing Sprint Spectrum, L.P., and Sprint Nextel Corporation alleging nearly identical claims and seeking similar relief. These two cases are pending in this court and consolidated under case No. C06-0592-JCC. Judge Coughenour, referring to this Court’s decision in Peck, ruled that the FCA

1 preempted any claims predicated on R.C.W. 82.04.500 because they were preempted, but
2 allowed claims for breach of contract and violation of the CPA. Hess v. Sprint Spectrum,
3 L.P., No. C06-0592-JCC, Amended Order, docket no. 58, at 6–8.

4 **DISCUSSION**

5 A complaint may be dismissed if it fails to state a claim upon which relief can be
6 granted. Fed. R. Civ. Proc. 12(b)(6). When evaluating a complaint under this rule, the Court
7 must accept all allegations of material fact as true and construe them in the light most
8 favorable to the non-moving party. Diaz v. International Longshore and Warehouse Union,
9 Local 13, 474 F.3d 1202, 1205 (9th Cir. 2007). If the plaintiff cannot prove any set of facts
10 in support of the claim that would entitle relief, the court may dismiss the claim. Id.

11 **Preemption**

12 Cingular has moved to dismiss all of Rienche’s claims based on federal preemption of
13 R.C.W. 82.04.500 by the FCA. The FCA prohibits states from regulating the rates cellular
14 telephone companies charge customers, but states may regulate other terms and conditions of
15 the service. 47 U.S.C. §332(c)(3)(A); Peck, Order, docket no. 61, at 2; Hess, Order, docket
16 no. 58, at 2. R.C.W. 82.04.500 prohibits passing the B&O tax directly on to customers by a
17 line item charge. Nelson v. Appleway Chevrolet, Inc., 129 Wn. App. 927 (2005) review
18 granted by 157 Wn.2d 1012 (July 7, 2006). The parties disagree whether the B&O surcharge
19 is a rate and not subject to state regulation rather than a term or condition that a state may
20 regulate.

21 The FCC has interpreted the prohibition of rate regulation in section 332(c)(3)(a) to
22 preempt state laws that regulate line items such as the B&O surcharge because they are
23 “rates.” Second Report and Order in re Truth and Billing, 20 F.C.C.R. 6448, 6462 (2005)
24 (“Second Report”) vacated by Nat’l Ass’n of State Utility Consumer Advocates, v. F.C.C.,
25 457 F.3d 1238 (11th Cir. 2006) (modified on reh’g, 468 F.3d 1272 (11th Cir. 2006))
26 (“NASUCA”). The FCC’s interpretation of an ambiguous statute should be given deference

1 if the statute is ambiguous or silent on the issue at hand, and the agency's interpretation is
2 based on a permissible interpretation of the statute. Chevron, U.S.A., Inc., v. NRDC, Inc.,
3 467 U.S. 837, 842–43 (1984). In Peck, this Court decided that the Cingular B&O surcharge
4 was a rate based on the FCC's interpretation. Peck, Order, docket no. 61, at 5. This Court
5 went on to hold that R.C.W. 82.04.500 was preempted to the extent it applied to this line
6 item. Id. Peck asked the Court to reconsider dismissal in light of an 11th Circuit Court of
7 Appeals decision vacating Second Report. NASUCA, 457 F.3d at 1254; Peck, Motion for
8 Reconsideration, docket no. 67. The Court denied the motion for reconsideration. Peck,
9 Minute Order, docket no. 74. Even though the Second Report had been vacated and could
10 not be considered precedential, the Court held that 11th Circuit decisions were not binding
11 on this Court. Id.

12 In Hess, Judge Coughenour decided that a similar Sprint B&O surcharge was a rate
13 based on the holding in Peck and Chevron and that claims based on R.C.W. 82.04.500 were
14 preempted. Hess, Order, docket no. 58, at 2. Judge Coughenour also considered but
15 declined to follow the contrary 11th Circuit ruling in NASUCA. Id.

16 For the reasons set out in Peck and Hess, the Court holds that Riensche's claims based
17 on R.C.W. 82.04.500 are preempted by the FCA.

18 Cingular also argues that application of R.C.W. 82.04.500 is unconstitutional because
19 it violates the dormant commerce clause and because it violates the First Amendment's
20 guarantee of free speech. It is a longstanding principle of judicial restraint that a court
21 should avoid reaching constitutional questions when resolution of such questions are
22 unnecessary. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 445
23 (1988); Lee v. Walters, 433 F.3d 672, 677 (9th Cir. 2005). Given the Court's holding on
24 preemption of R.C.W. 82.04.500, it is not necessary to decide whether the statute is
25 constitutional. Accordingly, the Court declines to reach the question of the constitutionality
26 of the statute.

Count I, Breach of Contract

Rienschel alleges that the collection of the B&O surcharge constitutes a breach of the service agreement between Rienschel and Cingular because the surcharge is being collected in addition to the agreed calling plan rate. Cingular argues that this claim is also preempted by the FCA because the claim is ultimately an attack on the B&O surcharge and is therefore preempted. Similar issues were before this Court and Judge Coughenour's court in Peck and Hess.

The Peck Order dismissed Peck's breach of contract claims because the claim would implicate Cingular's rates and was thus preempted by the FCA. Peck, Order, docket no. 61, at 6. Although the Peck complaint was substantially similar to the complaint in this case, the Peck complaint did not allege that the surcharge was collected in violation of the service agreement, only that it was charged in violation of R.C.W. 82.04.500. See Peck, Complaint, docket no. 4. The present complaint, on the other hand, alleges a breach of contract claim, separate from the R.C.W. violation, by alleging a collection of a surcharge in addition to and apart from the agreed rate. Complaint, docket no. 1, ¶ 4.1. Rienschel, unlike Peck, also affirmatively alleges that Cingular did not disclose the surcharge. Complaint ¶¶ 2.1, 2.6, 3.4, 3.6.2, 5.2.

The Hess Order did not dismiss similar breach of contract claims against Sprint. Hess, Order, docket no. 58, at 6. Judge Coughenour held that the Hess complaint alleged a breach of contract theory and whether the amount alleged to be charged in violation of the contract was labeled a B&O surcharge was immaterial. Id. When a cellular company bills a customer in violation of the customer's contract, such claims are not preempted by the FCA. Id.; see also In re Wireless Consumers Alliance, Inc., 15 F.C.C.R. 17021, 17035 (2000).

The Court holds that this complaint, like the Hess complaint, alleges a breach of contract claim independent of R.C.W. 82.04.500 and is therefore not preempted by the FCA. Accordingly, the Court DENIES Cingular's motion to dismiss the breach of contract claim.

Count II, Consumer Protection Act Claim

Cingular argues that Riensche's Consumer Protection Act claim, R.C.W. 19.86.010 et seq., is also preempted by the FCA. Cingular contends that the Riensche claim is indistinguishable from the Peck claim with the exception of "a few passing references to 'failure to disclose'." Mot. to Dismiss at 12. The Peck order denied a CPA claim because "nothing in the Complaint alleges that Cingular failed to disclose rates or taxes it charges to consumers." Peck, Order at 6 n.4. The Hess order did not dismiss CPA claims because they were not preempted under federal law. Hess, Order at 7. The Riensche complaint, similar to the Hess complaint, does allege that Cingular failed to disclose the surcharge before it appeared on customer's bills. Complaint, ¶¶ 2.1, 2.6, 3.4, 3.6.2, 5.2. The present CPA claim cures the lack of a failure to disclose allegation that was fatal to the Peck claim. The Court therefore DENIES Cingular's motion to dismiss Riensche's CPA claim because it is not preempted by the FCA.

Count III, Declaratory Judgment

Riensche seeks a declaratory judgment that Cingular's billing and collection of the B&O surcharge violates R.C.W. 82.04.500. R.C.W. 82.04.500 is preempted by the FCA, and the Court therefore GRANTS Cingular's motion to dismiss Riensche's Declaratory Judgment claim.

Count IV, Unjust Enrichment

Riensche claims that the collection of the B&O surcharge unjustly enriched Cingular. Cingular advances no argument other than federal preemption of R.C.W. 82.04.500 for why this claim should be dismissed. Riensche may be able to prove a set of facts that show the B&O surcharge unjustly enriched Cingular in a manner other than a violation of R.C.W. 82.04.500. The Court therefore DENIES Cingular's motion to dismiss the unjust enrichment claim.

1 **Motion to Strike**

2 Riensche moves to strike those portions of Cingular's Reply in Support of Motion to
 3 Dismiss, docket no. 27, that rely on the FCC's holding in Second Report, 20 F.C.C.R. 6448,
 4 which was vacated by the 11th Circuit's holding in NASUCA. NASUCA, 457 F.3d at
 5 1256–57. Riensche asks that Cingular, as a party to NASUCA, be precluded from re-
 6 litigating the issue of preemption as decided in Second Order. The adverse determination of
 7 the agency's statutory construction by the Eleventh Circuit Court of Appeals is not binding
 8 on this Court in the present case. Railway Labor Executives' Ass'n v. I.C.C., 784 F.2d 964
 9 (9th Cir. 1986). Furthermore, applying offensive collateral estoppel in this case would harm
 10 the development of the law in the area of the FCA's preemption of local tax laws because it
 11 may prevent a circuit split from developing and deprive the Supreme Court of differing
 12 points of view on which to grant certiorari and render a decision. See U.S. v. Mendoza, 464
 13 U.S. 154, 160–61 (1984) (holding that non-mutual collateral estoppel is not appropriate
 14 when used against the government because it would deprive the Court of several lower court
 15 perspectives before the Court grants certiorari). The Court therefore DENIES Riensche's
 16 motion to strike portions of Cingular's reply.

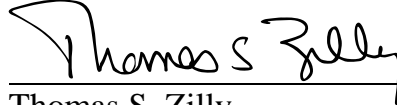
17 **Conclusion**

18 The Court GRANTS IN PART and DENIES IN PART Cingular's Motion to Dismiss
 19 for Failure to State a Claim, docket no. 24. The Court GRANTS IN PART Cingular's
 20 motion and DISMISSES Riensche's Count III, Uniform Declaratory Judgment Act and all
 21 other claims that the B&O surcharge violates R.C.W. 82.04.500 because the FCA preempts
 22 R.C.W. 82.04.500. The Court DENIES IN PART Cingular's Motion to Dismiss as related to
 23 Count I, Breach of Contract, and Count II, Violation of Consumer Protection Act, because
 24 these claims are not preempted by the FCA. The Court DENIES Cingular's Motion to
 25 Dismiss Count IV, Unjust Enrichment because this claim is not foreclosed by federal
 26

1 preemption. The Court DENIES Riensche's motion to strike portions of Cingular's reply,
2 docket no. 29.

3 IT IS SO ORDERED.

4 DATED this 22nd day of March, 2007.

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7 Thomas S. Zilly
8 United States District Judge
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